

Response to Office Action
SN 10/697,406

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OCT 02 2008**REMARKS****I. Status of Claims**

Claims 1-6 are pending. Claims 1-5 are amended herein.

II. Claim Amendments

Applicants thank the Examiner for his detailed reading of the claims. Applicants make the changes suggested by the Examiner to resolve his objections of antecedent basis, except that instead of using "the chosen critical path" throughout, Applicants have amended the claims to read "the selected specific critical path" which Applicants believe more clearly reflects the antecedent basis of claim element 1(d). No change in scope or patentable subject matter is made by these amendments.

III. Claim Rejection Under 35 USC §102 (e)

The Examiner has rejected claims 1-6 under 35 USC 102(e) as being anticipated by an article dated June 2003 by Beraudo et al. ("Beraudo"). However, Beraudo is inapplicable as prior art for two reasons and therefore cannot be used as prior art.

A. Only Patents or Patent Applications are Prior Art Under 102(e)

The relevant portion of Section 102(e) reads:

A person shall be entitled to a patent unless —
(e) the invention was described in (1) an **application for patent**, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a **patent** granted on an application for patent by another filed in the United States before the invention by the applicant for patent... (emphasis added).

Thus, only patent applications or patents can be used as prior art under 35 USC §102(e). However, Beraudo is not a patent or a patent application, it is an article. Therefore Beraudo cannot be used as prior art under Section §102(e) and Applicants respectfully request that this rejection be withdrawn.

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In the event the Examiner is inclined to reject the claims under 35 USC 102(a) or (b), Applicants conceived of the invention and reduced it to practice more than one year before Beraudo was published. An affidavit under 37 CFR §1.131 is enclosed which establishes facts showing invention and the reduction of practice before June 2005.


CONCLUSION

Applicants respectfully submit that all objections and rejections have been traversed, and that the application is in form for issuance.

Respectfully submitted,

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Dated



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